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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/591,308	09/01/2006	Marcel Minor	207,808	9258

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Abelman Frayne and Schwab
666 Third Avenue
New York, NY 10017-5621

EXAMINER

KRAUSE, ANDREW E

ART UNIT	PAPER NUMBER
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1794

MAIL DATE	DELIVERY MODE
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04/27/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/591,308

Applicant(s)

MINOR ET AL.

Examiner

ANDREW KRAUSE

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 22-41 is/are pending in the application.
- 4a) Of the above claim(s) 22-36 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 37-41 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/55/08)
Paper No(s)/Mail Date 5/2/2007, 5/2/07
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date ____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: ____

DETAILED ACTION

Election/Restrictions

1. Applicant's election of Group II, claims 37-41 in the reply filed on 4/3/09 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claim 38 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

4. A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question

or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 38 recites the broad limitation allowing granules in amounts as low as 0.01% of the dough, while claim 38 requires at least 0.1% of granules which is the narrower statement of the range/limitation.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

8. **Claims 39-41** are rejected under 35 U.S.C. 103(a) as unpatentable over Sharma (US 4,797,288).

9. Regarding claims 39-41, Sharma discloses a method of coating functional food ingredients (core material) such as drugs or sweeteners with a molten lipid material. Example 7 discloses providing non-lipophilic particular ingredients including about 80 % of 100 mesh (149 micron) KCl salt in and about 20% aspartame as a flavorant (column 13, lines 1-4). Sharma discloses mixing this core material with a molten fatty acid or wax to create a uniform dispersion of the core material and then spray congealing (spray chilling) the uniform dispersion into agglomerates in which a plurality of the core materials are enveloped by a discrete continuous lipid phase, and where the

agglomerates are sieved to have an average diameter in the range of about 200 mesh (75 microns)-50 mesh (300 microns) (column 6, line 55-column 7, line 18, Example 7).

10. Sharma further discloses coating the agglomerates with a second coating comprising molten lipid material using fluidized bed coating to produce uniformly coated agglomerates (column 7, lines 19-36, 54-59).

11. Regarding the melting points of the molten lipid materials, Sharma discloses that the delivery system preferably has a melting range of about 35 C to about 38 C, thereby providing melting temperatures in the range of 30-45 C, and also keeping the melting temperature of the second molten lipid material within 5 degrees Celsius of the continuous lipid phase (column 7, lines 19-36).

12. Although Sharma does not explicitly disclose the steps of cooling the coated agglomerates to ambient temperature and collecting the coated agglomerates to obtain the granulate, it is obvious to one having ordinary skill in the art that following the use of the fluidized bed, the granulates will intrinsically cool to room temperature. It is further obvious that the coated agglomerates are being collected to obtain the granulate, as said granulate is later incorporated into baked goods, food products and the like (column 8, lines 30-48).

13. **Claims 37-38** are rejected under 35 U.S.C. 103(a) as unpatentable over Sharma (US 4,797,288) in view of Dusterhoft et al (US 2006/0110494).

14. **Regarding claim 37**, Sharma discloses a method of preparing a granules suitable for foodstuffs having an average diameter of 200-30 mesh (75-500 microns) (column 8, lines 22-24) and comprising, for example;

- a. 38% of non-lipophilic particles with an average diameter of 100 mesh (149 microns) including 20% functional food ingredient (aspartame); and
- b. 62% of a discrete continuous phase comprising lipids, which envelopes the non-lipophilic particles and holds them together, and is formed into an agglomerate with a diameter in the range of 200 mesh (75 microns)-50 mesh (300 microns) (column 6, line 55-column 7, line 18, Example 7, also see above).

15. Sharma further discloses enveloping this agglomerate with an exterior lipophilic layer having a melting point of 35-38 C (see column 7, lines 19-36, and above) in an amount of, for example, 200% by weight of the agglomerate (claim 1, (c)).

16. With that amount of coating the granule would contain applicants elements (a), (b), and (c) in amounts of about 12.6%, 20.6%, and 66.8% respectively.

17. Sharma discloses incorporating this composition into baked goods (column 8, lines 31-32). Although Sharma does not disclose first preparing a dough or batter, it would have been obvious to one having ordinary skill in the art at the time of the

invention that in order to create a baked good comprising the granular composition, a batter or dough containing the granular composition would have to be created prior to baking.

18. Sharma fails to explicitly disclose the amount of the granulate incorporated into the dough or batter. However, Dusterhoft discloses incorporating similar lipid encapsulated functional food ingredients into dough for producing baked goods in an amount of about between 0.01 and 5 wt. % of the dough ([0039], claim 14). It would have been obvious to one having ordinary skill in the art at the time of the invention to modify use the functional food ingredient disclosed by Sharma in an amount as disclosed by Dusterhoft, as such an amount as such amounts provide adequate doses of the functional food ingredient while still providing a consistent baked product ([0014]).

Conclusion

19. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. References cited as 'X' in the international search report but not used as a basis for rejections in this action have not been applied as such rejections would be cumulative to the rejections of record.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREW KRAUSE whose telephone number is (571)270-7094. The examiner can normally be reached on 7:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ANDREW KRAUSE/
Examiner, Art Unit 1794

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794